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Supreme Court, U.S.
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No. 95-1500

In The

Supreme Court of the United States

October Term, 1995

SAMUEL J. STOORMAN,

Petitioner,

v.

GREENWOOD TRUST COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The Colorado Supreme Court

MEMORANDUM OF THE RESPONDENT

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QUESTION PRESENTED

The sole question properly presented for review is the third question listed in the petition, which respondent would suggest rephrasing as follows:

> Does the term "interest" in Section 27 of the Federal Deposit Insurance Act, 12 U.S.C. § 1831d, include late fees that a credit card borrower has agreed to pay in the event of delinquency?

Petitioner's first two questions are not presented by this case. The Colorado Supreme Court did not hold that the term "interest" in Section 27 is defined by reference to Delaware law. Instead, the Court repeatedly stated that this term is defined by federal law. (Pet. App. 4, 6, 7).

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent Greenwood Trust Company states that it has no subsidiaries. Its corporate parent is NOVUS Credit Services, Inc., which in turn is owned by Dean Witter, Discover & Co.

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OPINIONS BELOW

The Opinion of the Colorado Supreme Court is published at 908 P.2d 133 (1995) and is reprinted in petitioner's Appendix at App. 1-7. The Opinion of the Colorado Court of Appeals is published at 888 P.2d 289 (1994) and is reprinted in petitioner's Appendix at App. 11-21. The order of the District Court, City and County of Denver, Colorado is unreported and is reprinted in petitioner's Appendix at App. 22-23.

JURISDICTION

The Colorado Supreme Court entered its judgment on December 18, 1995. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause, U.S. Const. art. VI, cl. 2, is set out at page 3 of the Petition.

Section 27 of the Federal Deposit Insurance Act, 12 U.S.C. § 1831d, is set out at pages 3-4 of the Petition.

Section 950 of Title 5 of the Delaware Code is set out at pages 6-7 of the Petition.

ARGUMENT

Respondent Greenwood Trust Company ("Greenwood") hereby responds to, but does not oppose, the petition for a writ of certiorari to review the unanimous opinion rendered in this action on December 18, 1995 by the Colorado Supreme Court. In that opinion, the Colorado Supreme Court correctly held that late charges are "interest" for purposes of Section 27 of the Federal Deposit Insurance Act, 12 U.S.C. § 1831d, which was originally enacted as Section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub.L. No. 96-221, § 521, 94 Stat. 132, 164-165 (1980).

Even though the Colorado Supreme Court's opinion was correct, Greenwood does not oppose the petition because it recognizes that this case satisfies the Court's criteria for granting certiorari. There presently exists an irreconcilable conflict between state supreme courts and United States Courts of Appeals concerning the meaning of "interest" in Section 27 of the Federal Deposit Insurance Act and the statute upon which it was modeled, Section 85 of the National Bank Act, 12 U.S.C. § 85. The First Circuit and highest courts of Colorado and California have held that the term "interest" in Section 521 of the Federal Deposit Insurance Act and Section 85 of the National Bank Act encompasses credit card late charges. *See Smiley v. Citibank (South Dakota), N.A.*, 11 Cal.4th 138, 44 Cal. Rptr.2d 441, 900 P.2d 690 (1995), *cert. granted*, 116 S. Ct. 806 (1996) (§ 85 case); *Harris v. Chase Manhattan Bank, N.A.*, 34 Cal.App.4th 1563, 35 Cal. Rptr.2d 733 (1994), *review granted*, 38 Cal. Rptr.2d 346, 889 P.2d 540 (Cal. 1995), *review dismissed*, 46 Cal. Rptr.2d 748, 905 P.2d 417 (Cal. 1995), *petition for cert. pending*, No. 95-951 (filed

Dec. 18, 1995) (combined § 85 and § 521 case); *Richardson v. Citibank (South Dakota), N.A.*, 908 P.2d 532 (Colo. Dec. 18, 1995), *petition for cert. pending*, No. 95-1493 (filed March 18, 1996) (§ 85 case); *Copeland v. MBNA America, N.A.*, 907 P.2d 87 (Colo. 1995), *petition for cert. pending*, No. 95-1056 (filed Dec. 28, 1995) (§ 85 case); and *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 974 (1993) (§ 521 case).

However, the Supreme Court of New Jersey has disagreed with these rulings, and instead has held that the meaning of "interest" in Section 27 of the Federal Deposit Insurance Act and Section 85 of the National Bank Act is narrowly restricted to percentage-based periodic rates. *Hunter v. Greenwood Trust Co.*, 143 N.J. 97, 668 A.2d 1067 (1995), *petition for cert. pending*, No. 95-963 (filed Dec. 18, 1995) (§ 521 case); *Sherman v. Citibank (South Dakota), N.A.*, 143 N.J. 35, 668 A.2d 1036 (1995), *petition for cert. pending*, No. 95-991 (filed Dec. 21, 1995) (§ 85 case).

This Court recently granted certiorari to resolve this conflict. *Smiley v. Citibank (South Dakota), N.A.*, 11 Cal.4th 138, 44 Cal. Rptr.2d 441, 900 P.2d 690 (1995), *cert. granted*, No. 95-860, 116 S. Ct. 806 (1996). The only difference between this case and *Smiley* is that *Smiley* involves Section 85 of the National Bank Act, while this case involves Section 27 of the Federal Deposit Insurance Act. However, Section 27 was modeled upon Section 85, incorporates the same language, and has been repeatedly and uniformly construed *in pari materia* with Section 85. Indeed, petitioner does *not* challenge the Colorado Supreme Court's holding that the term "interest" in Section 27 of the Federal Deposit Insurance Act has the same meaning as "interest" in Section 85 of the National Bank

Act. (App. 6). Since the *Smiley* decision will be dispositive of this case as well,[1] respondent respectfully submits that the Court should hold this case in abeyance pending its decision in *Smiley*, and then decide this case in accordance with its decision in *Smiley*.

As noted above in the "Question Presented for Review," petitioner has misstated the issues that are presented by this case. Contrary to the assumption underlying petitioner's first two "Questions Presented," the Colorado Supreme Court did *not* hold that the term "interest" in Section 27 should be defined by reference to Delaware law. The Colorado Supreme Court made absolutely *no* reference to the Delaware statutory definition of "interest," and it repeatedly stressed that it was defining "interest" as a matter of *federal* law:

> We conclude that, *as a matter of federal law*, the ten dollar late payment fee imposed on Stoorman's Discover credit card account is a form of 'interest' under section 521 of DIDA. (App. 4) (emphasis added).
>
> * * *
>
> In *Copeland*, we held that, as a matter of *federal* law, late payment fees are included as a form of 'interest' under section 85 of the NBA, 12 U.S.C. section 85 (1982). Thus, *federal* law authorizes a national bank located in Delaware to charge

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[1] The "Questions Presented for Review" by petitioner in this case are virtually identical to those raised by the petitioner in *Smiley*. This is no doubt attributable to the fact that lead counsel for petitioner here also represents the petitioner in *Smiley*.

> Colorado customers a fifteen dollar late payment fee as allowed under Delaware law. (App. 6) (emphasis added).
>
> * * *
>
> Therefore, we conclude that, as a matter of *federal* law, late payment fees are included as a form of 'interest' under section 521 of the DIDA. (App. 7) (emphasis added).

CONCLUSION

Even though the Colorado Supreme Court's decision is correct, Greenwood recognizes that the Court's criteria for certiorari are satisfied here, and therefore it does not oppose the petition. Since the issue presented here is the same as that now pending in *Smiley v. Citibank*, Greenwood respectfully submits that the Court should hold this case until its decision in *Smiley*.

Respectfully submitted,

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